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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-586

WILLIAM S. NEIL, Warden, Tennessee State Penitentiary,
Petitioner,

against

ARCHIE NATHANIEL BIGGERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Interest of *Amicus*

The decision below, without discussion of the applicable statutory mandate of 28 U.S.C. § 2244(c), held that an equally divided affirmance of a conviction by this Court does not preclude a defendant from subsequently obtaining a writ of habeas corpus on the same issues from a federal district court. The court below also ruled upon the validity of voice identification evidence.

The Attorney General of the State of New York represents petitioners in the case of *Hon. David Ross, et al.* v. *Stephen Radich*, No. 71-1510, petition for certiorari pending before this Court. *Ross* v. *Radich* squarely presents

the question of the meaning and effect of 28 U.S.C. § 2244 (c) and of this Court's 4-4 affirmances. Thus, the Attorney General has a direct interest in this Court's resolution of the issue.

Question Presented

Whether a defendant whose conviction is affirmed 4-4 by this Court may relitigate the same issues in the federal courts despite the explicit Congressional prohibition in 28 U.S.C. § 2244(c)?

ARGUMENT

This Court's prior affirmance of Biggers' conviction, by an equally divided vote, is a jurisdictional bar to consideration of the same issues in a federal habeas corpus hearing.

This Court has unequivocally stated that its divided affirmances are not *stare decisis* as to other parties, but are "as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868); *United States* v. *Pink*, 203 U.S. 194, 216 (1941); *Hertz* v. *Woodman*, 218 U.S. 205, 213 (1909).

28 U.S.C. § 2244(c) provides that this Court's disposition "at the instance of the [same] prisoner" precludes the subsequent issuance of any writ of habeas corpus. Thus, Biggers' request for *habeas* consideration cannot be granted by a federal district judge.

In order to avoid duplication, *amicus* Attorney General of the State of New York respectfully refers this Court to a full analysis of these issues in the pending petition for certiorari in *Ross* v. *Radich*, No. 71-1510, pp. 7-12.

CONCLUSION

The judgment of the Sixth Circuit should be reversed and the petition for writ of habeas corpus should be dismissed.

Dated: New York, New York, July 25, 1972.

Respectfully submitted,

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